

TITLE MC-12
DEPARTMENT OF PLANNING
SUBTITLE 02
MAUI PLANNING COMMISSION
CHAPTER 202
SPECIAL MANAGEMENT AREA RULES

Subchapter 1 General Provisions

§12-202-1	Title
§12-202-2	Purpose
§12-202-3	Scope
§12-202-4	Definitions
§12-202-5	Severability
§12-202-6	Special management area boundaries and maps
§12-202-7	Implementation of rules

Subchapter 2 Special Management Area Permit Procedures

§12-202-10	Special management area objectives and policies
§12-202-11	Special management area review guidelines
§12-202-11.5	Special management area categorical exemptions
§12-202-11.6	Actions previously assessed and permitted
§12-202-12	Assessment and determination procedures
§12-202-13	Notice of application and notice of public hearing; adequacy of notice
§12-202-14	Special management area minor permit procedures
§12-202-15	Special management area use permit procedures
§12-202-16	Special management area emergency permit procedures
§12-202-17	Amendments to permit approvals

Subchapter 3 Procedures to Adopt Special Management Area
Rules; Declaratory Rulings; Adoption and
Amendment of Boundaries and Maps;
Enforcement; and Appeals

§12-202-21	Petition and procedures to adopt, amend, or repeal special management area rules; declaratory rulings
§12-202-22	Adoption and amendment of special management area boundaries and maps
§12-202-23	Enforcement
§12-202-24	Conflicts with other laws
§12-202-25	Penalties
§12-202-26	Appeal of director's decision; filing the notice of appeal; settlement of appeal
§12-202-27	Content of the appeal
§12-202-28	Joint or consolidated appeals
§12-202-29	Service of the notice of appeal
§12-202-30	Payment of fees
§12-202-31	Contested case hearing on appeal
§12-202-32	Disposition of appeal

SUBCHAPTER 1

GENERAL PROVISIONS

§12-202-1 Title. The rules in this chapter shall be known as the "Special Management Area Rules for the Maui Planning Commission." [Eff 1/1/94] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §205A-29)

§12-202-2 Purpose. The purpose of these rules is to implement Hawaii Revised Statutes (HRS) chapter 205A, relating to coastal zone management and special management areas, and to establish application procedures for special management area assessments, emergency permits, minor permits, and use permits, time periods within which hearings must be held, and procedures to provide notice to individuals whose property rights may be affected. The rules further the policy of the State to preserve, protect and where possible, restore the natural resources of the coastal zone. The rules also assist the commission in giving full consideration to the State policy of establishing special controls on development within the areas along the shoreline to provide adequate access to beaches, recreational areas, and natural reserves. [Eff 1/1/94] (Auth: HRS §§91-24 2, 205A-27, 205A-29, 205A-30) (Imp: §§ HRS 205A-1 to 205A-33)

§12-202-3 Scope. (a) The rules contained in this chapter shall apply to the special management area on the island of Maui as designated on the special management area maps and specifically excluding the islands of Kahoolawe, Molokai, and Lanai.

(b) The rules in this chapter may not apply to special management area and shoreline area applications that have been deemed complete by the director before the effective date of these rules. An application shall be deemed complete by the director upon receipt of final agency comments and notification being sent by the department to the applicant to that effect. Applications deemed complete may be processed under the rules in effect at the time the application was deemed complete. [Eff 1/1/94] (Auth: HRS §§46-4, 91-2, 205A-27, 205A-29) (Imp: HRS §205A-23)

§12-202-4 Definitions. For the purposes of this chapter, and unless it is plainly evident from the context that a different meaning is intended, the definitions of this chapter shall be those set forth in sections 205A-1, 205A-22, and 205A-41, HRS (copies of which shall be provided pursuant to section 12-202-7), and as follows:

"Best Management Practices" or "BMPs" means a set of mitigation actions that are intended to protect the environment from harm and to ensure that water quality and marine resources are protected during all phases of a project or activity.

"Categorical exemption" means a proposed use, activity, or operation for

which a special management area assessment, emergency permit, minor permit, or use permit is not required, pursuant to section 12-202-11.5.

"Coastal dune" means one of possibly several continuous or nearly continuous mounds or ridges of unconsolidated sand continuous and immediately landward of the beach, situated so that it may be accessible to storm waves and seasonal high waves for release to the beach or offshore waters as defined by chapter 20.08, Maui County Code.

"Coastal erosion" means the wearing away of coastal lands, usually by wave attack, tidal or littoral currents, or wind. Coastal erosion is synonymous with shoreline (vegetation line) retreat.

"Commission" means the Maui planning commission.

"Cumulative impact" or "cumulative effect" means the impact on the environment that results from the incremental impact of the proposed action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

"Department" means the department of planning of the County of Maui.

"Development" means any of the uses, activities, or operations on land or in or under water within a special management area as defined by section 205A-22, HRS, as amended.

"Development plan" means a detailed drawing to scale that shows the proposed activity or structure and all areas where work will be performed. The plan shall include:

- (1) Property boundaries;
- (2) All existing natural and constructed features and conditions that occur within the proposed area of work; and
- (3) All proposed modifications to existing features, such as excavation or other ground-altering activity (length, width, and depth), and proposed new features and conditions.

The director may require that the plan include an accurate instrument survey of the lot as well as cross sections of the lot at designated locations to be prepared by a surveyor licensed in the State of Hawaii.

"Director" means the director of the department of planning of the County of Maui.

"Director of public works" means the director of the department of public works of the County of Maui.

"Environmental assessment" or "environmental impact statement" means an informational document that is prepared in compliance with chapter 343, HRS, and the rules of the office of environmental quality control.

"Erosion hazard line" (EHL) means the mapped, 80 percent, cumulative probability contour of the coastal erosion hazard zone with 3.2 feet of sea level rise on the date these rules were adopted. The EHL will reflect the best available science as published in peer reviewed literature such as the Hawaii Climate Change Mitigation and Adaptation Commission's 2017 Hawaii Sea Level Rise Vulnerability and Adaptation Report, as accessible within the Hawaii Sea Level

Rise Viewer hosted by the Pacific Islands Ocean Observing System. The EHL and resulting setback may need to be updated to reflect future updates and reports based on best available science with such updates being adopted by the commission.

"Estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage.

"Exempt action" or "exemption" means a proposed use, activity, or operation that is not a development as defined by section 205A-22, HRS and determined by the director, and as otherwise provided herein.

"Ground altering" or "ground disturbance" means grading, trenching, digging, grubbing, excavating or otherwise moving soil or other natural material that comprises the surface and subsurface of a parcel of land to the extent that such activity could potentially impact cultural or natural resources as determined by the director.

"HRS" means the Hawaii Revised Statutes, as amended.

"Hana advisory committee" means the Hana advisory committee to the Maui planning commission pursuant to chapter 2.28 of the Maui County Code.

"Lot" means a designated parcel, tract, or area of land established by subdivision or as otherwise established prior to the adoption of subdivision laws.

"Nonstructural improvement" or "nonstructural" is or describes any improvement, maintenance, repairs or renovations which does not alter the load-bearing components essential to the stability of the overall structure. Nonstructural improvements may include, but are not limited to, window or door replacement or additions, reroofing, storage sheds, fencing, signage, low impact development parking lot improvements, addition of solar panels that do not significantly alter building height or previously developed land area, or other activities that do not affect the integrity of a structure as defined in HRS 205A-22.

"Nonsubstantive amendment" means a proposed change to a permit scope that has no detrimental impact to the special management area or places additional demands on infrastructure that are discernibly different than that associated with the original approval.

"Owner" means all holders of an equitable or legal interest in real property on the island of Maui, including any lessee holding under a recorded lease with a term of five years or more.

"Proposed action" means any use, activity, or operation proposed by an applicant within the special management area.

"Related adjacent parcel" means one or more lots or parcels that is next to, across the street from or in close proximity to, as determined by the director, a lot or parcel that is proposing or has proposed development as one combined or related project, including a project that is developed in phases.

"Reconstruction" means rebuilding more than 75 percent of an entire structure as measured by either the floor area or current valuation.

"Renovation" means the remodel, update, or upgrade of a structure that does not increase existing height or floor area and is not reconstruction.

"Repair" means the fixing or replacing of any part of an existing structure for the purpose of its maintenance, or renewal of surface treatments such as painting, carpeting, or exterior siding with substantially similar use of materials and location, but does not include expansion of use or intensity, reconstruction or renovation.

"Sand" means particles of mineralogic or rock material ranging in diameter from 0.0625 millimeters to 2 millimeters that shall be substantially clean of rubble and debris; shall contain no more than fifteen percent volume of silt which ranges in diameter from 0.039 millimeters to 0.0625 millimeters and clay which ranges in diameter from 0.00006 millimeters to .0039 millimeters; and shall not consist of artificially crushed coral as defined by chapter 20.08, Maui County Code. Additional specifications on quality, such as for dune or beach restoration purposes, may be required.

"Sea Level Rise Exposure Area" (SLR-XA) means the area of projected land loss (erosion) and flooding (high wave and passive) on the date these rules were adopted and as mapped by the department. The SLR-XA will reflect best available science as published in peer-reviewed literature such as the Hawaii Climate Change Mitigation and Adaptation Commission's 2017 Hawaii Sea Level Rise Vulnerability and Adaptation Report, as accessible within the Hawaii Sea Level Rise Viewer hosted by the Pacific Islands Ocean Observing System. The SLR-XA may need to be updated to reflect future updates and reports based on best available science, with such updates being adopted by the commission.

"Shoreline", as defined in HRS section 205A-1 as amended, means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of natural rather than artificially induced vegetation growth, or the upper limit of debris left by the wash of the waves that has been certified by the board of land and natural resources for a duration determined by the board.

"Shoreline area" as defined in HRS section 205A-41, as amended, means all of the land area between the shoreline and the shoreline setback line, and may include the area between mean sea level and the shoreline, provided that if the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this part extends seaward of the shoreline, then "shoreline area" shall include the entire structure.

"Significant effect" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the County's or State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare or cultural practices of the community.

"Single-family residence" means one single-family dwelling and all accessory structures thereto, including one accessory dwelling as defined in and provided by title 19 of the Maui County Code, as amended, that together may be considered an exempt action as defined in this section. For the purposes of this

definition, floor area means the roofed area of all floors of a structure measured from the exterior faces of the exterior walls or from the center line of party walls dividing a structure; the floor area of a structure, or portion of the floor area, that is not enclosed by exterior walls shall be the area under the covering, roof, or floor that is supported by posts, columns, partial walls, or similar structural members that define the wall line. Excluded from the floor area are:

1. Attic areas with head room less than seven feet.
2. Projections such as sunshade devices and architectural embellishments that are decorative only.
3. Areas covered by roofing treatment to screen rooftop machinery only.
4. Areas underneath unsupported roof overhangs or cantilevered building overhangs, provided no portion of the area is enclosed except for a safety railing or wall not exceeding four feet in height.

"Structural improvement" means any improvement that alters load-bearing components essential to the stability of the structure and that does not exceed \$500,000 in valuation.

"Structure" includes, as defined in HRS section 205A-41, as amended, any portion of any building, pavement, road, pipe, flume, utility line, fence, groin, wall, or revetment.

"Urban design review board" means the Maui County urban design review board as established under chapters 2.26 and 2.40 of the Maui County Code, as amended.

"Use" means a use as defined in title 19 of the Maui County Code, as amended.

"Valuation" means the cost of an activity, building, or structure as determined by real property valuation by the director of finance, an estimated valuation by an architect, engineer, or contractor licensed by the department of commerce and consumer affairs, State of Hawaii, or the director of public works. In the event of a conflict among valuations, the higher amount shall be used for the purposes of these rules.

[Eff 1/1/94; am 9/28/97, am and comp 9/25/03, am and comp 4/21/08]
(Auth: HRS §§91-2, 205A-29) (Imp: HRS §205A-29)

§12-202-5 Severability. If any provision of these rules or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of these rules that can be given effect without the invalid provision or application. To that extent the provisions of these rules are severable. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §§91-2, 205A-9)

§12-202-6 Special management area boundaries and maps. The special management area shall be all lands so designated on the maps adopted by the commission as of November 19, 1975, or as amended pursuant to section 205A-23, HRS, which maps are in the keeping of the department. These maps shall be the official special management area to be administered and enforced under

these rules. [Eff 1/1/94](Auth: HRS §§91-2, 205A-23, 205A-27, 205A-29)
(Imp: HRS §205A-23)

§12-202-7 Implementation of rules. The director shall provide such applications in a form as may be necessary to accomplish the intent of these rules, and shall provide upon request, a copy of sections of Hawaii Revised Statutes referenced in these rules. Such copies shall be provided as a convenience to the public and shall be accompanied with a disclosure cautioning readers that reproduced sections should not be relied upon to be accurate, complete, or applicable to any particular application and that reference should be made to the Hawaii Revised Statutes, all supplements thereto and acts of the State legislature. The director may also publish with the rules, or separately, tables, charts, or other graphics that will serve to clarify or illustrate various provisions. A charge may be imposed for copying costs. The director shall administer this chapter. [Eff 1/1/94, am and comp] (Auth: HRS §§91-2, 205A-290) (Imp: HRS §205A-29)

SUBCHAPTER 2

SPECIAL MANAGEMENT AREA PERMIT PROCEDURES

§12-202-10 Special management area objectives and policies. (a) The objectives and policies of this chapter shall be those set forth in section 205A-2, HRS, as amended.

(b) In implementing these objectives and policies, the department or the commission, as appropriate, shall fully consider ecological, environmental, recreational, cultural, historic, and scenic resources as well as needs for economic development and hazard mitigation. [Eff 1/1/94] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4)

§12-202-11 Special management area review guidelines. The review guidelines set forth in section 205A-26, HRS, as amended, shall be used by the director and the commission, as appropriate, for the review of developments proposed in the special management area. [Eff 1/1/94] (Auth: HRS §§91-2, 91-4.2, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-26)

§12-202-11.5 Special management area categorical exemptions. Pursuant to HRS 205A-22, it is hereby assessed and determined that any use, activity, or operation listed below, by its minimal nature, does not have a cumulative impact or a significant environmental or ecological effect on the special management area, and therefore is exempt from any requirements for a special management area permit. However, such uses, activities, or operations may require implementation of relevant best management practices published by the Department and may be subject to other assessment or permitting requirements, such as a building permit, a historic district permit, or a flood development permit, and may require a shoreline setback approval if the action is located within the shoreline area.

Those who propose any use, activity or operation pursuant to subsections k, l and m below in the special management area must complete a declaration form, provided by the department and made accessible to the public, that may establish action-specific Best Management Practices and other appropriate restrictions.

(a) Transfer of land title; creation or termination of easements, covenants, or other rights in structure or land;

(b) Normal and customary agricultural activities on land currently or historically used for such activities, provided that appropriate best management practices to control or minimize pesticide and sediment runoff are implemented to minimize impacts to nearshore waters;

(c) Changes in uses or operations, including changes between short-term and long-term occupancy of dwelling units and various uses of beach parks that are under county or state jurisdiction, that do not increase the density or intensity of use. Increases in the density or intensity of use can be demonstrated by increased off-street parking requirements, pursuant to Title 19, Maui

County Code, or increased storage needs;

(d) Archaeological, geophysical, percolation, engineering, soils, and other scientific testing conducted by a licensed archaeological or scientific professional involving temporary excavation limited to the minimum extent determined necessary and appropriate or as approved by the State Historic Preservation Division, and employing best management practices protective of the environment and natural and cultural resources;

(e) Nonstructural interior maintenance, repairs, and renovations to existing, lawfully established structures that involve no expansion or ground disturbance, and do not increase the density or intensity of use, such as paint, floors, carpets, cabinets, and interior walls and doors, limited to a cumulative valuation of less than \$500,000 in any 24-month period for a single ownership on a single lot or set of lots composing a unified building site, provided best management practices required by the department are implemented. Increases in the density or intensity of use can be demonstrated by increased off-street parking requirements, pursuant to Title 19, Maui County Code, or increased storage needs;

(f) Driveway and parking lot pavement patching, resurfacing, resealing, restriping, and repairs; and pavement reconstruction not over three hundred square feet provided best management practices required by the department are implemented;

(g) Exterior installation on and maintenance, repairs, and renovations to existing, lawfully established structures that involve no ground disturbance and that are nonstructural, such as signage, wireless antennae and other transmission equipment, satellite dishes, and roof mounted equipment, such as photovoltaic and solar panels, provided best management practices required by the department are implemented;

(h) Site improvements, except in coastal dunes, involving limited ground disturbance, such as minor surface grading and grubbing, installation of turf, shallow landscaping, and irrigation, and installation of asphalt or concrete slabs and driveways, up to six inches deep, up to three hundred square feet, and no more than once in a 24-month period;

(i) Site improvements, except in coastal dunes, involving limited ground disturbance more than six inches deep and up to sixteen square feet no more than once in a 24-month period for holes or trenching, such as the installation, removal, or maintenance of trees and shrubs, utility pedestals, ground signs, water, sewer, and conduit lines, walls and fences up to four feet in height, telephone and light poles, mailbox posts, and solar panels, provided that the improvements may be subject to shoreline setback approval pursuant to the Shoreline Rules, and provided that this does not include new wireless telecommunications towers, windmills and wind turbines;

(j) Traditional native Hawaiian cultural practices that are conducted or led by native Hawaiian cultural practitioners and that do not have a detrimental environmental or ecological effect on the special management area.

(k) Nonstructural exterior maintenance, repairs and renovations to existing, lawfully established structures that involve no ground disturbance,

such as doors, windows, shutters, siding or roofs and, for structures erected in 1981 or after, to protect against impacts from lead-based paint, painting with related preparatory work; such activities are limited to a cumulative valuation of less than \$500,000 in any 24-month period for a single ownership on a single lot or set of lots composing a unified building site; and provided a declaration is filed with the department committing to implementing best management practices required by the department;

(l) Operation and maintenance activities for existing public roadways and drainage systems, subject to approval by the applicable state or county agency, such as vegetation management activities, including tree trimming and cutting and vegetation removal; clearing obstructions including beach sand accumulations that block publicly-owned drainage ways, provided that beach sand is placed on adjacent beaches or dunes, and the obstruction consists solely of beach sand that is removed to the minimum volume and depth necessary to allow for passage of flood waters; and including roadway pavement patching, repair, restriping and grooving but not including resealing, resurfacing or reconstruction; and provided a declaration is filed with the department committing to implementing best management practices required by the department;

(m) With the application of best management practices to protect the marine and land environment, emergency protection of water, wastewater, or stormwater infrastructure managed by the Department of Water Supply, the Department of Environmental Management or the Department of Public Works if such infrastructure is at imminent risk of failure which would substantially affect public health or safety, including significant water loss, or contamination of surface water, land, or water supply, and provided a declaration is filed with the department;

(n) During the applicable timeframe of a Governor's or Mayor's disaster or emergency declaration or proclamation, while required permits are obtained and while using best management practices to protect natural and cultural resources:

- (i) the removal and disposal of disaster debris that does not expand the area of disturbance; emergency structure stabilization and control erosion and runoff;
- (ii) emergency repairs to roofs and windows that do not expand the footprint or use of the habitable structure while and after required permits are obtained;
- (iii) emergency installation of protective measures to protect habitable structures provided such measures are temporary and limited in scale.

Failure to file a declaration could be subject to enforcement in accordance with these rules. Filing a declaration for an action that requires an assessment or a permit could be subject to enforcement in accordance with these rules. The department does not review or respond to the filing of declarations.

§12-202-11.6 Actions previously assessed and permitted. Any action

in the special management area that was previously determined to be exempt, or that was determined to be a development and required and obtained a special management area permit, may be continued, renovated or repaired in a manner that falls within the same scope of the prior exemption or permit, provided that the action involves no ground-altering activity and does not expand the structure, unless otherwise provided by the terms of the exemption or permit.

§12-202-12 Assessment and determination procedures. (a) Any proposed action within the special management area that does not fully fall within any of the categorical exemptions listed in section 12-202-11.5 shall be subject to an assessment and a determination made by the director as to whether it is a development and requires a special management area use permit or minor permit or is an exempt action. Such assessment shall be pursuant to sections 205A-22 and HRS 205A-26, HRS, and the significance criteria set forth in this section.

(b) The applicant or the director may waive assessment and determination, and the applicant may apply for a special management area use permit pursuant to the provisions of sections 12-202-13 and 12-202-15.

(c) Assessment applications shall be submitted in a format prescribed by the department and shall include the following information and documentation:

- (1) Identification of the applicant and documentation of ownership or tenancy and, if the applicant is not the owner, authorization by the owner of the parcel on which the proposed action is to occur; if the subject parcel has more than one owner and does not have a managing association authorized to submit the application, evidence of notification to all owners shall also be provided;
- (2) Tax map key number and acreage or square footage of the parcel on which the proposed action is to occur;
- (3) A location map;
- (4) A development plan, drawn to scale, of the parcel upon which the proposed action is to occur; the development plan shall show existing conditions including human-caused and natural features such as large trees, rock outcroppings, or other known sensitive environmental areas such as special flood hazard area, coastal dune, tsunami zone, erosion hazard line within the parcel, 3.2-foot sea level rise exposure area, wetland, streams, estuary or geologically hazardous land, as applicable;
- (5) If the proposed action involves new structures, the applicant shall provide dimensioned floor plans, sections, and elevations;
- (6) Photographs identifying the area where the action is to occur; video may also be provided;
- (7) A written description of the proposed action, including the use, length, width, height, building materials, size of structures in square feet and, if applicable, area, depth, or volume of grubbing, grading, fill, and any other ground-altering activity such as utility

- installation;
- (8) A written description of the anticipated impacts of the proposed action on the special management area that addresses or describes:
 - (A) The environmental setting of the parcel that is the subject of the proposed action;
 - (B) The relationship of the proposed action to the objectives and policies of chapter 205A, HRS; zoning; and the general plan;
 - (C) The probable impact, including cumulative impacts, of the proposed action on the special management area; and
 - (D) Measures proposed to minimize potential impacts, including best management practices.
 - (9) A written estimated valuation of all components of the proposed action, including any component that could be considered to be exempt;
 - (10) A zoning and flood confirmation form, completed and signed by the department unless the Department ceases the use of such form;
 - (11) A draft environmental assessment or a draft environmental impact statement, if the proposed action is subject to chapter 343, HRS, and the department or commission is the accepting agency; or the agency decision letter and any final environmental document, if the proposed action is subject to chapter 343, HRS, and a government agency has determined that the action is exempt, issued a finding of no significant impact, or accepted a final environmental impact statement;
 - (12) Any oral or written comments received by the applicant from governmental or nongovernmental agencies, community organizations, applicable design review committees, or individuals with regard to the proposed action, and a summary of the dates and attendance of public meetings held on the proposed action;
 - (13) Any other information and documentation required by the department to properly process the application; and
 - (14) An administrative fee as established in the County budget.
- (d) The assessment application shall be reviewed as follows:
 - (1) Upon submission of an application that contains all required information, the director may submit the application to appropriate agencies for review and comment. The director shall request such agencies to provide their comments on the application within thirty days from the date on which the application was distributed for review, or as otherwise specified by the director. The director shall determine that the application is complete when adequate agency comments and, if applicable, applicant responses have been received. Upon a determination that an application is complete, the director shall review the proposed action and make a written evaluation as to:
 - (A) The valuation of the proposed action;
 - (B) Whether the proposed action is a development or is an exempt

- action or, upon further consideration, the proposed action did not require a special management area assessment and is a categorical exemption pursuant to section 12-202-11.5; and
- (C) The potential adverse environmental and ecological effects based upon the following significance criteria:
 - (i) The sum of those effects that adversely affect the quality of the environment and the ecology, and the overall and cumulative adverse effects of the proposed action, including the extent of sea level rise impacts predicted during the proposed action's lifespan (PD);
 - (ii) Every phase of a proposed action, its expected primary and secondary consequences, and its cumulative and short-term or long-term effects, including previous, ongoing and other proposed or completed actions on the same parcel or on related adjacent parcels that together with the subject parcel comprise a development within the preceding two years. A proposed action may have a significant adverse effect on the environment when the proposed action potentially:
 - (A) Causes an irrevocable or substantial and detrimental effect on any natural or cultural resources;
 - (B) Significantly curtails the range of beneficial uses of the environment;
 - (C) Conflicts with the County's or the State's long-term environmental policies or goals;
 - (D) Substantially and detrimentally affects the economic or social welfare and activities of the community, County, or State;
 - (E) Causes substantial and detrimental effects on public facilities, such as increased demand on drainage, sewage, and water systems, beach access, recreational opportunities, and pedestrian walkways;
 - (F) In itself has no substantial and detrimental effects but cumulatively has substantial and detrimental effects upon the environment;
 - (G) Substantially and detrimentally affects a rare, threatened, or endangered species of animal or plant, or its habitat;
 - (H) Is inconsistent with the State plan, County general plan including the Maui Island Plan and appropriate community plans, zoning, and subdivision ordinances;
 - (I) Substantially and detrimentally affects air or water quality;
 - (J) Substantially and detrimentally affects or is likely to suffer damage by being located in an environmentally sensitive area, such as flood plain, shoreline, coastal dune, tsunami zone, erosion-prone area, sea level rise exposure

area, wetland, geologically hazardous land, estuary, fresh waters, or coastal waters;

(K) Substantially and detrimentally alters natural land forms and existing public views, or curtails or forecloses potential improvements to public views, to and along the shoreline; or

(L) Is inconsistent with the objectives and policies of chapter 205A, HRS.

(e) An application is automatically incomplete, at any stage of the application process, if it is for or relates to land use on a lot or on a unit in a condominium property regime that is the subject of an unresolved enforcement action by the department, pursuant to section 12-202-23, if the department has sent a notice of warning or notice of violation for the enforcement action. However, an application is not automatically incomplete if the applicant pays all fines associated with the unresolved enforcement action as required by the director, and approval of the application would resolve the enforcement action. An enforcement action is unresolved until all fines as determined by the director have been paid.

(f) Based upon the assessment and review of the application, and considering the significance criteria set forth in section 202-12(d)(1)(C), the director shall make a determination and notify the applicant in writing within thirty calendar days after the application is complete that the proposed action either:

- (1) Is exempt from the requirements of this chapter because it is not a development pursuant to section 205A-22, HRS, as amended;
- (2) Is a development and requires a special management area minor permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with section 12-202-14; or
- (3) Is a development and requires a special management area use permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with sections 12-202-13 and 12-202-15.

(f) If the director determines that the proposed action is a development and requires a special management use or minor permit, and if the proposed action is not consistent with the County general plan, including the Maui Island Plan and applicable community plan, or zoning, the director shall notify the applicant that a general plan, community plan, or zoning amendment is required and that an amendment application can be processed concurrently with the SMA permit application. [Eff 34 1/1/94; am 9/28/97; am and comp 9/25/03; am and comp 10/10/03; am and comp 12/20/04] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-29, 205A-30.)

§12-202-13 Notice of application and notice of public hearing; adequacy of notice. (a) Where these rules require a public hearing, the applicant shall prepare for the department's review a notice of application with a legible location map using a form provided by the department. Prior to publication, the

department shall review the notice of application for completeness. Within ten calendar days of departmental approval, the applicant shall submit the notice of application to a newspaper for publication. The applicant shall publish the notice of application once in a newspaper printed and issued at least twice weekly in the County and which is generally circulated throughout the County.

(b) When required by these rules, the commission shall hold a public hearing after the director has determined the application is ready for public hearing.

(c) When these rules require a public hearing, the applicant shall prepare for the department's review a notice of public hearing with a legible location map using a form provided by the department. The department shall notify the applicant of the date of the public hearing at least forty-five days prior to the public hearing date. The department shall approve the applicant's notice of public hearing before mailing.

(d) The applicant shall mail the notice of public hearing not less than thirty calendar days before the hearing date by certified or registered mail or with delivery confirmation, postage prepaid, to owners of record of real property situated within five hundred feet of the boundaries of the parcel that is the subject of the application. The applicant shall obtain the addresses of the owners of record from the real property tax division, department of finance, within thirty calendar days prior to the mailing of the notice of public hearing. The applicant shall also send notice to all persons who have requested the commission in writing to be notified of the subject special management area proceedings.

(e) Not less than thirty calendar days prior to the public hearing date, the director shall publish a notice of public hearing, once, in a newspaper that is printed and issued at least twice weekly in the County and which is generally circulated throughout the County, pursuant to section 1-28.5, HRS. The notice shall state the nature of the proposed development, the date, time, and place of the hearing, and all other matters required by law.

(f) The director may authorize the consolidation of the hearing with any other hearing required pursuant to law, or pursuant to any rules adopted thereunder.

(g) The mailed notice of public hearing shall be deemed adequate, and the failure of any owner to receive such notice shall not invalidate any application, proceedings, assessment, or determination by the commission if the applicant, by affidavit, verifies that the names and addresses of owners of real property situated within five hundred feet of the subject parcel were obtained from the County of Maui real property tax division, department of finance, within thirty days of the mailing of the notice of public hearing, stating both the date the addresses were obtained and the date notice was mailed, accompanied by receipts of certified or registered mail or evidence of delivery confirmation. If there are multiple owners of a property, notification of all persons listed by name in the records of the County of Maui real property tax division, department of finance, shall be deemed adequate notice as to all owners. [Eff 1/1/94; am 9/28/97; am 11/13/00] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §§1-28.5,

205A-29)

§12-202-14 Special management area minor permit procedures. (a) If the director has determined that the proposed action is a development and requires a special management area minor permit, the assessment application submitted pursuant to section 12-202-12 may be deemed the minor permit application.

(b) The director shall approve, approve with conditions, or deny such permit in accordance with the guidelines in section 205A- 26, HRS, as amended. Any final decision shall be transmitted to the applicant in writing and shall be appealable pursuant to section 12-202-26.

(c) The director shall notify the commission, at the commission's next regularly scheduled meeting, of the director's approval of special management area minor permits, receipt of which shall be acknowledged by the commission. Such notification shall include the name of each applicant, the proposed development, and the location and purpose of the development. [Eff 1/1/94; am 9/28/97, am and comp 12/28/02] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-26, 205A-29, 205A-30)

§12-202-15 Special management area use permit procedures. (a) Any person whose proposed action is a development and requires a special management area use permit, or who has waived an assessment by the department, shall file an application with the department on a form provided by the department, which may be required to be filed electronically, and which shall require:

- (1) All information and documentation required pursuant to section 12-202-12(c), and
- (2) An administrative fee as established in the County budget. The payment of the fee for development without a permit shall not relieve any persons from fully complying with the requirements of these rules nor from any penalties prescribed in section 12-202-25.

(b) Upon receipt of the application, the director shall review the application based on the policies, objectives, and guidelines as provided in sections 12-202-10 and 12-202-11 and, if necessary, request that the applicant provide any additional data or information as may be required for review of the proposed development. The application shall not be transmitted for agency review until the director is satisfied that the application has fulfilled all application requirements and has addressed the policies, objectives, and guidelines.

(c) The director shall submit the application, with all relevant information, to appropriate agencies for review and comment. The director shall request such agencies to review and comment on the proposed development within thirty days from the date on which the application was distributed for review.

(d) The director shall present the proposed development, if applicable, to the urban design review board for comment and recommendations to the

commission. The Hana advisory committee is hereby designated by the commission to conduct the public hearing for applications in the Hana Community Plan region.

(e) Upon receipt of agency comments and, if applicable, adequate applicant responses, the director shall schedule the application for public hearing.

(f) The commission shall approve a special management area use permit, subject to terms and conditions as permitted in sections 205A-26(1) and 205A-26(3), HRS, as amended, and any standard conditions approved by the commission if it finds the criteria set forth in sections 205A-26(2) and 205A-26(3), HRS, as amended, have been met. The commission shall deny a special management area use permit if it finds these criteria have not been met and potential detrimental impacts cannot be adequately mitigated.

(g) Findings of fact, conclusions of law, and decision and order shall be issued in accordance with the rules of practice and procedure for the commission in effect when action is taken. [Eff 1/1/94; am 9/28/97, am and comp 12/28/02, am and comp 4/21/08] (Auth: HRS §§91-2, 91-4.2, 205A-26, 205A-27, 205A-29) (Imp: HRS §§205A-4, 205A-26, 205A-28, 205A-29)

§12-202-16 Special management area emergency permit procedures. (a) An owner or authorized representative may apply for a special management area emergency permit when the owner or representative has concluded that danger and substantial harm to property, any person, or the public health, safety, and welfare is imminent. The director will consider the application, including best management practices to protect the environment, and determine whether the project is a development and therefore requires a permit, and whether conditions justify issuance of a permit to begin work immediately. The purpose of an emergency permit is to allow an urgently needed protective measure, principally of a temporary nature. The temporary measure may also be allowed as a permanent measure only after the director has determined it is the best environmentally sound alternative, in which event the applicant shall apply for a permit pursuant to section 12-202-12. A temporary measure may be allowed for no more than one hundred eighty days while, if necessary, a permanent measure is formulated, permitted, and completed. The director may approve a time extension for a temporary measure when the director determines the permit holder is making adequate progress toward completing a permanent measure, but cannot reasonably do so within the time the emergency permit, or an extension thereof, allows, provided the director notifies the commission of the extension at its next regular meeting after the extension has been approved.

(b) Any person seeking a special management area emergency permit shall file an application with the director before commencing any emergency work. The application, provided by the department, shall require:

- (1) Identification of the applicant and documentation of ownership or tenancy and, if the applicant is not the owner, authorization by the owner of the parcel on which the proposed action is to occur; if the parcel has more than one owner and does not have a managing

association authorized to submit the application, evidence of notification to all owners shall be provided;

- (2) The tax map key number and acreage or square footage of the parcel on which the proposed action is to occur;
- (3) A written description of the proposed action, including the length, width, height, and type of materials, size of structures in square feet and, if applicable, area, depth, or volume of grubbing, grading, or fill and any other ground-altering activity;
- (4) A written statement of the emergency or imminent danger or substantial harm to property, any person, or the public health, safety, or welfare; and why the proposed development would be immediately required to prevent danger or substantial harm;
- (5) The most current shoreline survey, if available and applicable;
- (6) Photographs identifying where the emergency exists and where the action is to occur; video may also be provided;
- (7) Any other relevant information requested by the director;
- (8) Electronic copies of all application documents; and
- (9) An administrative fee as established in the County budget.

(c) The director may allow the deferral of the filing of a written application if the applicant demonstrates to the satisfaction of the director that imminent danger and substantial harm to a habitable structure, any person, or the public health, safety, or welfare would result from the delay in filing a written application. After giving verbal approval to such a request, the director shall issue a written confirmation of the verbal approval, which shall contain:

- (1) The date and time the request was made;
- (2) The date the permit was issued;
- (3) Applicant's and project names, address, email address, and telephone number;
- (4) Tax map key number (if available);
- (5) Statement of the imminent danger posed and the substantial harm that could occur if the permit were not granted;
- (6) The permitted temporary measures;
- (7) The requirement that not more than sixty calendar days after the approval of the request, the permit holder shall submit a written emergency permit application as provided in subsection (b), and that if the applicant fails to do so, the director may require that any temporary measure be removed; and
- (8) The statement that other permits may be required.

(d) No special management area emergency permit shall allow the repairs or reconstruction of structures if such structures were not lawfully constructed.

(e) After reviewing a written application, the director shall issue a written special management area emergency permit where the applicable provisions of this section have been met and the director finds the criteria set forth in sections 205A-22 and 205A-30, HRS, as amended, have been met.

In the event of impending or presently occurring disaster, the mayor may waive the requirements of sections 12-202-12, 12-202-14, or 12-202-15, but not this section.

(f) The director may place reasonable terms, conditions, and time stipulations upon such permit.

(g) The director shall set a date by which the applicant shall submit an application for a permit pursuant to sections 12-202-14 or 12-202-15, or by which the applicant must remove or terminate any temporary measures.

(h) For an emergency permit request that is the result of or that otherwise involves coastal erosion, the director shall consult with the State department of land and natural resources, office of conservation and coastal lands, or other relevant State agency, on whether to approve any temporary measure in order to benefit both the applicant and neighboring shoreline properties, to resolve the emergency situation expeditiously, and to minimize the environmental impact to the coastal zone. Any such approval, in addition to any project-specific conditions, shall include the following conditions:

(1) Within ninety days, the applicant shall provide the department a description of potential long-term alternatives designed to alleviate the emergency situation, which shall include:

(A) alternatives, including relocation of threatened structures or elevation of structures, and dune or beach restoration;

(B) assessment of other viable alternatives, which may include protective or erosion control measures, such as groins, and offshore structures such as breakwaters;

(C) a description of how each alternative complies with chapter 12-203 of the commission's shoreline rules, if applicable;

(C) a draft timeline to plan, design and complete each long-term alternative; and (D) a list of potential federal, State, and County permits required to achieve each long-term alternative.

(2) Within one hundred eighty days of the permit's approval, the permit holder shall consult with the department about identified long-term alternatives to understand the requirements and restrictions for work permitted in the shoreline area, as defined in the commission's shoreline rules, if applicable.

(3) The permit holder shall remove the temporary measure unless the permit holder submits an application by the date specified by the emergency permit to allow the temporary measure to remain, pursuant to subsection (i).

(i) No less than thirty days prior to the expiration date of an emergency permit, the permit holder may apply for a time extension for any permit provision on a form provided by the department. Such application shall include, at a minimum:

(1) a description of the permit holder's preferred alternative;

(2) evidence that the permit holder is making adequate progress toward completing permanent measures, but reasonably cannot do so within the time allowed by the emergency permit; and

- (3) a plan and timeline for obtaining all required permits. The director may approve a time extension for no more than one hundred eighty days at a time.

(j) If the director finds there is no imminent danger or substantial harm to a habitable structure, any person, or the public health, safety, or welfare, or that the requirements of subsection (h) were not met, the director shall deny the emergency permit. If the director denies the emergency permit, the denial shall be in writing, setting forth facts sufficient to demonstrate the application did not meet the requirements for issuance of the emergency permit pursuant to subsection (h). The director shall notify the applicant it can submit an application for an assessment, a special management area use or minor permit in accordance with these rules, and shall inform the applicant of the right to appeal pursuant to section 12-202-26.

(k) The director shall provide notice of the director's approval of all emergency permits and extensions thereof to the commission at the next regular meeting after the permit has been issued, receipt of which shall be acknowledged by the commission. [Eff 1/1/94; am 9/28/97] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§91-2, 91-14, 205A-30)

§12-202-17 Amendments to permit approvals. (a) Request. Any person who has been issued a special management area emergency permit, minor permit, or use permit may request the director or commission, as appropriate, to amend any permit approval.

(b) Form. Any person seeking to amend a permit approval shall file an application with the department in a form provided by the department, the content of which shall include:

- (1) A description of the requested amendment;
- (2) The reasons and justification for the request;
- (3) An administrative fee as established in the County budget;
- (4) If the request is for a permit transfer, the transferor's consent and a notarized affidavit from the transferee acknowledging and agreeing to comply with the permit approval;
- (5) If the request is to amend a time stipulation, the length of time requested, an analysis of whether any changes have occurred within the special management area since the granting of the permit that may cause the permit holder's development to have a substantial adverse environmental or ecological effect or adversely affect the capacity or condition of infrastructure; and
- (6) Any other information and documentation requested by the director.

If applicable, the director shall circulate the request to appropriate agencies for review and comment.

(c) Permit transfer. Unless otherwise specified in the permit approval, the director may issue a written approval for a special management area use permit transfer.

The director shall notify the commission, at the commission's next regularly scheduled meeting, of the issuance of any permit transfer, receipt of

which shall be acknowledged by the commission. Such notification shall include the permit transfer approval letter. Nothing in this section shall prevent the director from forwarding any permit transfer request to the commission for action in accordance with procedures set forth in this section.

(d) Time stipulation. Unless otherwise specified in the permit approval, the director may approve a time extension of no more than five years to initiate construction or to complete construction, provided that the director determines that there have been no changes within the special management area since the granting of the permit that will cause the permit holder's development to have any substantial adverse environmental or ecological effect or adversely affect the condition or capacity of infrastructure.

If a petition to intervene was granted and any person other than the applicant was admitted as a party to any prior proceeding on the matter, the director shall notify such person at the person's last known address at least ten days prior to taking action on the time-extension request to determine if such person has any objections or concerns that the director should consider in deciding whether to approve or disapprove the request or forward the request to the commission.

The director shall notify the commission at the commission's next regularly scheduled meeting of the issuance of any time extension, receipt of which shall be acknowledged by the commission. Nothing in this section shall prevent the director from forwarding any time extension request to the commission for action in accordance with procedures set forth in this section.

If the director finds there have been changes within the special management area since the granting of the permit that will cause the permit holder's development to have any substantial adverse environmental or ecological effect, or adversely affect the condition or capacity of infrastructure, the request shall be scheduled for commission action.

A request for a time extension must be submitted prior to permit expiration. If a timely request is submitted but not approved prior to permit expiration, the permit shall remain in effect until the renewal is granted or denied, unless the applicant causes substantial delay in the review and approval process.

(e) Amendment or determination other than transfer or time extension. Unless otherwise specified in the permit approval, the director may approve nonsubstantive amendments to the permit and may make determinations regarding permit approvals when such amendments or determinations are nonsubstantive. If the director determines that the requested amendment or determination is substantive, then the director shall forward the request to the commission for action. The director shall determine whether a public hearing shall be held and, if a public hearing is required, set a date for the hearing and provide notice as required by section 12-202-13. The commission shall conduct a hearing in accordance with the procedures set forth in its rules.

(f) Intervention. If a petition to intervene was granted and any person other than the applicant was admitted as a party to any prior proceeding on the matter, and the proposed amendment or determination clearly pertains to or

could affect the same rights, privileges or interests on which the intervention was based, the applicant shall notify such person in writing, at the person's last known address, of the requested amendment or determination, and ask if such person requests that a public hearing be held. The applicant shall provide the department with evidence of such notification, including proof of mailing, which shall be verified by the department and be to the satisfaction of the director. A public hearing on the requested amendment or determination shall be held if requested by any such person within thirty days of the date the applicant's notice was mailed. Notice of public hearing shall be given pursuant to the procedures set forth in section 12-202-13. The commission shall conduct a hearing in accordance with the procedures set forth in its rules. This section shall not apply to requests for permit transfers or time extensions. Requests for permit transfers shall be processed pursuant to section 12-202-17(c) and requests for time extensions shall be processed pursuant to section 12-202-17(d).

(g) Commission action. Findings of fact, conclusions of law, and decision and order for any special management area use permit application seeking to amend or determine any permit approval shall be issued in accordance with the rules of practice and procedure of the commission in effect when action is taken and the review guidelines as set forth in section 12-202-11. [Eff 1/1/94; am 9/28/97, am and comp 4/21/08] (Auth: HRS §§91-2, 205A-29, 205A-30) (Imp: HRS §§205A-26, 45 205A-29)

SUBCHAPTER 3

PROCEDURES TO ADOPT SPECIAL MANAGEMENT AREA RULES; DECLARATORY RULINGS; ADOPTION AND AMENDMENT OF BOUNDARIES AND MAPS; ENFORCEMENT; AND APPEALS

§12-202-21 Petition and procedures to adopt, amend, or repeal special management area rules; declaratory rulings. The commission may adopt, amend, or repeal any of these rules by following the procedures outlined in its rules of practice and procedure section 12-201-92. Any interested person may petition the commission for a declaratory order as to applicability of any statutory provision or, of these rules, or of any order of the department or the commission relating to the special management area pursuant to the commission's rules of practice and procedure section 12-201-93. [Eff 1/1/94] 16 (Auth: HRS §91-2) (Imp: HRS §§91-3, 91-4, 91-6, 91-7)

§12-202-22 Adoption and amendment of special management area boundaries and maps. (a) The director may, at any time, initiate a review of and amendments to the boundaries of any special management area map in accordance with the requirements of this section.

(b) The commission, by a two-thirds vote of its total membership, may direct the director to initiate a review of and amendments to the special management area boundaries.

(c) The director shall give notice of the director's intent to amend the special management area boundaries to the commission, the general public, and the office of planning, stating the initiation date and estimated completion date of the director's review and submittal of the proposed amendments to the commission. Upon submittal of the proposed amendments to the commission, the director shall schedule the proposed amendments for public hearing.

Not less than thirty calendar days before the public hearing date, the director shall publish a notice of public hearing once in a newspaper that is printed and issued at least twice weekly in the County and is generally circulated throughout the County, pursuant to section 1-28.5, HRS. The notice shall state the proposed amendment, the date, time, and place of the hearing, a map of the proposed boundary amendment, and all other matters required by law.

The notice published in the newspaper shall be deemed adequate, and the failure of any owner to receive such notice shall not invalidate any amendments, proceedings, assessment, or determination by the commission.

(d) The commission may amend the special management area boundaries only upon the finding that the amendments will further the objectives and policies of chapter 205A, HRS, as amended, and will be consistent with the general plan and other applicable ordinances of the County of Maui. Upon review of the State of Hawaii office of planning, pursuant to section 205A-23, HRS, the commission shall render a final decision and issue a written order and, if applicable, direct the director to issue a final map within sixty calendar

days after the final vote of the commission, unless otherwise extended by vote of the commission. [Eff 1/1/94; am 9/28/97; am 11/13/00] (Auth: HRS §91-2) (Imp: HRS §§1-28.5, 205A-23)

§12-202-23 Enforcement. (a) The director shall enforce these rules, except as otherwise provided herein.

(b) Any use, activity, construction or operation pursuant to these rules and section 205A-22, HRS, as amended, that requires and fails to obtain a special management area exemption, emergency permit, minor permit, or use permit or has failed to comply with conditions established with any such permit, is a violation of these rules and chapter 205A, HRS. The violation shall be corrected by requiring the owner or violator to pay all applicable fines and take the following corrective actions:

- (1) Any unpermitted use, activity, or operation has ceased;
- (2) Any unpermitted construction has been removed with appropriate permits;
- (3) An exemption, emergency permit, minor permit, permit amendment, or use permit has been issued; or
- (4) Other means determined by the director have been achieved.

Applicable fines shall accrue until the violation is corrected. No other permit or approval shall be construed as special management area permit approval pursuant to this part.

(c) If a portion of a constructed structure is situated within the special management area, and the structure has not been authorized with government agency permits required by law, then for purposes of enforcement of this part, the entire structure shall be construed to be entirely within the special management area and shall be subject to enforcement accordingly.

(d) Issuance of notice of violation and order.

- (1) The owner shall, and the alleged violator may, be notified by the enforcement agency of an alleged violation of these rules and any approval, permit, or permit condition issued pursuant thereto. The director shall provide service by at least one of the following methods, in order of preference, as the director deems appropriate: certified or registered mail, regular mail with delivery confirmation, personal service, or posting on the property. If, after a reasonable effort has been made and is documented by the director, and the owner and alleged violator have not been serviced, the director may provide service by publishing the notice once per week for three consecutive weeks in a newspaper that is printed and issued at least twice weekly in the County and is generally circulated through the County. The date of service shall be the date on which the certified or registered mail is accepted, the date of regular mail delivery confirmation, the date of personal service, the date of posting on the property, or the date of the last publication in the newspaper. If the director uses more than one method of service, then the date of service shall be the later of the dates of service.

- (2) The notice of violation and order shall include the specific section of these rules that has been violated; the nature of the violation; and the remedy required or available, including cessation or removal of the violation, subject to applicable permitting requirements; that an initial civil fine be paid not to exceed \$100,000 per violation; that a civil fine be paid not to exceed \$10,000 per day for each day in which the violation persists, unless otherwise required or allowed by statute, in addition to the foregoing and any other penalties; and that the landowner or violator may appeal the notice of violation pursuant to section 12-202-26 within thirty days of the date of service. The filing of an appeal shall not correct or suspend any violation or stay the assessment and accumulation of fines. The following and other applicable and reasonable criteria shall be considered in assessing the initial and daily fines:
- (A) Previous violations by the same person;
 - (B) The degree of damage or potential damage to the environment, including damage to the shoreline and marine resources;
 - (C) The degree of cooperation provided by the violator during the investigation;
 - (D) Amount necessary to deter future violations;
 - (E) Evidence of circumstances beyond the control of the violator;
 - (F) Whether the owner or violator knew or should have known that assessments or approvals were required; and
 - (G) The amount of time and resources required by the department to investigate and determine that a violation occurred.
- (3) The department, in consultation with the department of the corporation counsel, may institute a civil action in any court of competent jurisdiction for the enforcement of any settlement agreement or order issued pursuant to this section.
- (4) Nothing in this section shall prohibit the department, through the corporation counsel, from filing an order or motion directly with a court in the event that public health, safety and welfare may be at risk.
- (5) Nothing in this section shall prohibit the department from issuing a warning to the violator before issuing a notice of violation and order. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-43, 205A-43.6) (Imp: HRS §43.6)

§12-202-24 Conflicts with other laws. In case of a conflict between the requirements of any other State law or County ordinance regarding the special management area, the more restrictive requirements shall apply in furthering the purposes of this part. Nothing contained in this part shall be construed to diminish the jurisdiction of the State department of transportation over wharves, airports, docks, piers, or other commercial harbors, and any other

maritime facilities constructed by the State; provided that such plans are submitted for the review and information of the officer of the respective agency charged with the administration of the County zoning laws, and found not to conflict with any County ordinances, zoning laws, and building codes. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-48) (Imp: HRS 44 §205A-48)

§12-202-25 Penalties. Any person who violates any provision of these rules shall be liable for an initial civil fine not to exceed \$100,000 per violation and maximum daily fine of \$10,000 in addition to any other penalties until the violation is remedied, unless otherwise required or allowed by statute. A civil fine may be imposed by the department after an opportunity for an appeal hearing under chapter 91, HRS, as amended, and subsection 12-202- 26(b) herein. A special management area permit application submitted subsequent to an applicant's having completed the development or having been cited for the activity or construction without having obtained special management area approval, shall not stay any order to pay civil fines, including initial and accumulating daily fines. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-32) (Imp: HRS §§205A-22, 205A-26, 205A-28, 205A-29, 205A-30, 205A-33)

§12-202-26 Appeal of director's decision; filing the notice of appeal; settlement of appeal. (a) For decisions other than enforcement proceedings pursuant to section 12-202-23, appeal of the director's decision may be made to the commission by the filing of a notice of appeal with the department not later than ten days after the receipt of the director's written decision, or, where the director's decision is not required by the commission or these rules to be served upon appellant, not later than ten days after the meeting at which the commission received notification of the director's decision. For enforcement proceedings pursuant to section 12-202-23, appeal of a notice of violation may be made to the commission by the filing of a notice of appeal with the department within thirty days of the date of service. The notice of appeal shall be filed in accordance with section 12-201-20 of the rules of practice and procedure for the Maui planning commission. The department shall notify the commission, at the commission's next regularly scheduled meeting, of the filing of the notice of appeal.

(b) An owner or violator who receives a notice of violation and order who believes that any part of the notice of violation and order, including fines, was issued in error, may submit a written request for the director to negotiate a final resolution of issues, including any corrective action that must be taken by the owner or violator, any permits that are required, any fines that must be paid, and any actions that are required by the department. The request shall be submitted within ten days of the date of service of the notice and may be submitted in addition to or instead of an appeal pursuant to subsection (a).

(c) The director and owner or violator may agree on a resolution that includes a reduction of accumulated fines and correction of the violation. If the resolution reduces the accumulated fines by \$50,000 or less, then the director will notify the owner or violator in writing and establish which party shall draft

the agreement. At the commission's next regularly scheduled meeting, the director shall notify the commission of the agreement, receipt of which shall be acknowledged by the commission.

(d) If the director and the owner or violator agree on a resolution that reduces the accumulated fines by more than \$50,000, then the director will notify the owner or violator in writing and establish which party shall draft the agreement. The agreement shall be submitted to the commission for final action. The commission may accept, accept with modifications, or reject the agreement.

(e) If the director and the owner or violator do not agree on a resolution, the director will notify the owner or violator in writing of the director's termination of the negotiation. Submittal of any request for a negotiated resolution shall not affect the accrual of daily fines or any time limitations for appealing the notice of violation and order to the commission. [Eff 1/1/94; am and comp 9/28/97; am and comp 11/4/02] (Auth: Charter §§ 8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-27 Content of the appeal. The appeal to the commission shall identify the party making the appeal. The appeal shall designate the decision appealed from and shall state the reasons for the appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-28 Joint or consolidated appeals. If two or more parties are entitled to appeal a decision of the director to the commission and their interests are such as to make joinder practicable, they may file a joint appeal and thereafter proceed on appeal as a single appellant. Appeals that are filed separately may be consolidated by order of the commission upon the commission's own motion, upon motion of a party, or upon stipulation of the parties to the several appeals. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-29 Service of the appeal. If the appellant is someone other than the applicant, appellant shall serve a file-marked copy of the appeal by mail or delivery thereof to counsel of record for each other party, or, if a party is not represented by counsel, to the party at the party's last known address. Proof of service shall be filed with the department within seven days after the filing of the appeal, and the department shall notify the commission of the filing of the appeal at the next regular meeting. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 36 205A-49)

§12-202-30 Payment of fees. Upon the filing of any separate or joint appeal, the appellant shall pay such fees as are set forth in the County budget ordinance. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-31 Contested case hearing on appeal. The commission shall

hold a contested case hearing on the appeal. The director, the appellant, the owner, and, where the appellant is someone other than the applicant, the applicant shall be parties to the proceedings. Subchapters 3, 4, and 5 of the rules of practice and procedure for the Maui planning commission, relating to petitions to intervene, contested case procedures, and post-hearing procedures, respectively, shall govern the proceedings, except that petitions to intervene on an appeal shall be filed with the commission no later than ten days after the meeting at which the commission received notification of the filing of an appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-32 Disposition of appeal. The commission may affirm the decision of the director, or may remand the case to the hearing officer, if any, with instructions for further proceedings; or it may modify the decision of the director if the substantial rights of the appellant may have been prejudiced because the decision is:

- (1) Based on clearly erroneous findings of material fact or erroneous application of the law; or
- (2) Arbitrary or capricious in its application; or
- (3) A clearly unwarranted abuse of discretion. [Eff 11/4/02; comp 11/4/02; am and comp 12/20/04] (Auth: HRS §§91-14(g)(6), 205A-43, 205A-43.5, 205A-43.6, 205A-45, 205A-49, Maui County Charter §§8-8.4, 13-2(15)) (Imp: HRS §§205A-29, 205A-30, 205A-43, 205A-43.5, 205A-43.6, 205A-45, 205A-49, Maui County Charter §§8-8.4, 13-2(15))